Supreme Court, U.S.
FILED
JUL 15 1992
OFFICE OF THE CLERK

92-226

NO.

IN THE SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM, 1991

JAMES ARTHUR ADAMS,

-and-

JOHNNIE LEE HAMILTON

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the evidence in a complex conspiracy trial, reasonably suggests the presence of multiple conspiracies, other than the single conspiracy alleged in the indictment, does a trial court's failure to charge this defense, where applicable, violate the Constitutional right to due process and a fair trial?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were James Arthur Adams and Johnnie Lee Hamilton, Petitioners herein; Petitioners' co-defendants at trial, Grady Louis White, Charles Kelley, Jr., Cassius Kelley, Donnell Kelley, Steven Cook, Stanley Bostick, Judson Sims, Jr., Frederick Harden; and the United States of America, the Respondent herein, represented by J. Michael Faulkner and W. Leon Barfield, Assistant United States Attorney, and Mervyn Hamburg, Attorney for the Department of Justice.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE PETITIONERS, James Arthur Adams and Johnnie Lee Hamilton, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 31, 1992.

OPINION BELOW

The opinion of the Court of Appeals below is reported in 953 F.2d 1344 (11 Cir. 1992). The opinion of the District Court below was not reported.

JURISDICTION

The Petitioners' convictions were affirmed by the United States Court of Appeals for the Eleventh Circuit, when it entered its judgment on February 19, 1992. The Petition for re-hearing of Hamilton and Adams was denied on March 31, 1992.

As has been noted herein, the Petition for Rehearing of co-indictee **GRADY LOUIS WHITE** was denied on April 15, 1992, and pursuant to Rule 13.4 of this Court, the deadline for filing this Petition is accordingly extended.

This Petition for Writ of Certiorari is filed within ninety (90) days of April 15, 1992.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V, as set forth below:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be drprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI, as set forth below:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF CASE

The indictment named thirty-two (32) original co-defendants and numerous unindicted co-conspirators. The government's case targeted members of the Kelley family who allegedly operated a Florida to Georgia marijuana/cocaine distribution scheme.

Petitioners Adams and Hamilton, who live in the Augusta, Georgia area, were portrayed as an alternative sources of cocaine for the conspirators.

The eleven-day trial in the U. S. District Court for the Southern District of Georgia resulted in the convictions of all defendants. Adams and Hamilton were convicted of conspiracy to possess and distribute cocaine and use of a telephone to facilitate a conspiracy.

Their appeals were unsuccessful in the Eleventh Circuit Court of Appeals, rehearing having been denied on March 31st, 1992.

The Motion for Rehearing by co-defendant, **GRADY LOUIS WHITE** was denied on April 15, 1992. This application is timely filed under Supreme Court Rule 13.4.

The error complained of was the trial court's refusal to charge the jury of the defense theory of multiple conspiracies. This specific charge was requested in writing and denied. The convictions of Adams and Hamilton were affirmed without opinion.

REASON FOR ALLOWANCE OF THE WRIT

The Petitioners, James Arthur Adams and Johnnie Lee Hamilton, were indicted with thirty-two (32) other original defendants. The indictment charged in the main a long standing drug trafficking conspiracy, multi-state in scope, but primarily conducted by the "Kelley" family between South Florida and Augusta, Georgia.

Ten defendants, including Petitioners, were tried in the United States District Court in Augusta, Georgia, in June of 1990.

The trial judge refused to charge the jury on the principle of multiple or separate conspiracies. This request was made in writing; considered by the trial judge and refused.

The evidence presented in this case as it relates (or does not relate) to these Petitioners is a classic textbook example of the "separate conspiracy" defense.

In the opinion of the Eleventh Circuit affirming these convictions, this issue was not addressed.

The binding case law of the Eleventh Circuit and the Supreme Court absolutely demand that the Petitioners were entitled to have a jury consider their defense of "multiple conspiracies".

No proper authority for denying this request was cited by the government.

Petitioners, here, will not attempt to recapitulate all of the evidence from the trial in order to demonstrate that a "multiple conspiracy" charge was required.

This has been done, in some degree, in the application filed in this Court by co-

defendant, Grady Louis White. More convincing, however, is the portion of the government's brief filed in the Eleventh Circuit wherein an overview of the conspiracy is described. Here, in the government's words, Adams and Hamilton are described as "an alternate source (to the conspirators) for cocaine".

The theme of the long standing conspiracy as alleged in the indictment portrayed marijuana and cocaine originating in South Florida and transported to Augusta, Georgia, by the "Kelley family". James Adams is described by the government as a flunky for Johnnie Lee Hamilton. Hamilton is described as a local supplier of drugs to some of the people formerly involved in the "Kelley" network.

The government and the Eleventh Circuit Court has failed to recognize that

Petitioners' complaint is that the trial court refused to charge their pertinent, proper, and, in reality, only defense of multiple conspiracy. No reported case in the entire United States stands as authority to deny this jury charge. Conversely, this proper request to charge is demanded by the authorities.

Without question, the failure of a trial court to give an instruction to the jury that sets forth for its consideration the sole defense upon which the defendant relies implicates and impugns vital due process concerns. The proposition has been firmly established by this Court that a jury is not authorized to convict a criminal accused of a single conspiracy when the evidence shows that he is capable of being involved in a lesser conspiratorial agreement not embraced by the conduct alleged in the indictment.

Koetteakos v. United States, 328 US 750 (1946).

In a similar vein, this Court has held that when a trial court fails to give an instruction on a lesser included offense concerning applicable conduct charged in the indictment, if there is a reasonable basis for an instruction of this kind in the evidence, there is a constitutionally unconscionable and intolerable danger that the accused may be convicted of such a crime by the jury's consideration of the evidence pursuant to a standard of proof less stringent than the constitutionally mandated criterion of "proof beyond a reasonable doubt." Beck v. Alabama, 447 US 625 (1980). See also Keeble v. United States, 412 US 205 (1973). The same precept should apply with equal force to the failure to instruct on multiple conspiracies in a case such as the

one at bar when there is a basis for such a charge in the evidence.

Both the lesser included offense doctrine and the multiple conspiracies concept advance the same interest in preserving the fundamental integrity of our judicial system - to make sure that an accused is not convicted of a crime alleged in an indictment when the evidence brought forward during his trial does not justify such a conviction by proof beyond a reasonable doubt. In the multiple conspiracies context there is the additional related concern that one not be convicted of a charge not alleged in the indictment - the unrelated conspiratorial agreement which is not circumscribed or embraced by the conduct charged in the indictment, but which is yet readily and logically inferable from the evidence as in this case.

> **To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is being accused.**

Dunn v. United States, 442 US 100, 106 (1979)

There is a seductive and superficial logic and a spurious judicial economy in allowing a conviction to stand notwithstanding the fact that an accused may very well have been convicted of a crime on the basis of unindicted conduct. Nevertheless, this Court in the decisions noted above has rejected such a doctrine of expediency and has insisted that a guilty verdict be firmly grounded in the particular conduct alleged in the indictment and the corresponding evidence brought forward by the prosecution. In order to effectuate the Court's concerns in this regard a necessary

corollary of the principles noted above is that the jury needs to be properly instructed on the issue of multiple conspiracies in order to protect the fundamental constitutional rights herein discussed. A proper jury instruction on this question is an integral part of the doctrine itself. You cannot have one without the other.

It is important to note that the several Courts of Appeal that have exhaustively and thoroughly considered this issue are in full accord with the Petitioners' argument.

United States v. Erwin, 793 F.2d 656 (5th Circuit 1986) dealt exhaustively with this issue. Erwin revealed a similar factual backdrop, but with greater connection between the defendants than is shown here.

The standard to be applied by a trial court, in deciding whether to charge a "multiple conspiracy" defense, is basically

the any evidence rule. Erwin, supra., at 662. Other courts in dealing with this precise issue have opined: "when the possibility of a variance appears, the judge should instruct the jury on multiple conspiracies." United States v. Griffin, 464 F.2d 1352 (9th Cir. 1972).

...."the court commits reversible error when it refuses a defendant's specific request to instruct on a multiple conspiracy theory and the theory has 'any evidentiary support whatsoever' United States v. Fowler, 735 F.2d 823 (5th Cir. 1984) and United States v. Goss, 650 F.2d 1336, 1344 (5th Cir. 1981) [emphasis supplied].

..."[The] defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence - - The district court's refusal to

give an instruction on Dennis' multiple conspiracies theory denied Dennis a fair trial." United States v. Dennis, 917 F.2d 1031 (7th Cir. 1990). [emphasis supplied.]

"It is well established that **"[a] criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be."** United States v. Pedroza, 750 F.2d 187 (2nd Cir. 1984), cert. denied, 479 U. S. 847.

In the instant case, the trial judge by refusing the charge decided as a matter of law that the multiple conspiracy defense had no application.

The "conspiracy type" mega-trial is the government's favorite weapon. The natural spill-over prejudice to peripheral defendants is the intimidation used so often and so skillfully by the zealous prosecutor.

Adams and Hamilton, the Petitioners herein, knew the danger and pitfalls of pleading not guility and subjecting themselves to a trial setting which would consume days outlining the "Kelley family" 's drug activities for the past fifteen (15) years. Nonetheless, they likewise knew that proof of multiple conspiracies which varied from the charged conspiracy was a total and complete defense if the evidence established that they were guilty of involvement in conspiratorial compacts separate and distinct from that charged in the indictment at issue.

Their sole defense was denied them by the trial court. The trial court's egregious error was ignored by the Eleventh Circuit without comment.

Such actions remove our Constitutional guarantees of a fair trial and due process. It is the primary function of this Court to

prevent such and to assure that if a criminal conviction of this kind is obtained it is based upon evidence which has been evaluated and considered by a properly instructed jury in accord with the principles set forth above.

CONCLUSION

The Court of Appeals' refusal to reverse the convictions of Hamilton and Adams represents such a radical departure from the accepted and usual course of judicial proceedings that this Court must exercise its power of supervision.

The appellants in Erwin and Fowler, supra, urged this identical error under similar, or perhaps far less compelling circumstances, and their convictions were readily overturned in unequivocal opinions. Hamilton's and Adams' convictions in June, 1990, were affirmed without comment. Why?

Criticism abounds that the Courts have grown weary during the course of the nation's drug war. Our country's jurisprudence, as it relates to convicted drug handlers, has been compromised.

The legal error in this case, according to all authorities, cannot seriously be denied, therefore some unarticulated premise is controlling. Is it the belief that even if this charge had been given, the jury would have returned the same verdict? If so, what rights will next fall prey to expediency?

The government is as much to blame as the trial judge for allowing this error to occur. The government's attorneys know the law pertaining to the "multiple conspiracy" defense. They should have urged the trial judge to give the requested charge, rather than jeopardize their case.

Drug conspiracy prosecutions are heavily weighted in favor of the government. Petitioners, such as Hamilton and Adams, are in such circumstances virtually always

impeded in the defense of such charges by the following factors:

[a] the inevitable spill-over prejudice from the massive drug trafficking evidence directed toward co-defendants;

[b] the diluted effect of cross-examination by ten defense attorneys in succession;

[c] the grueling, wearisome effects of an eleven-day trial when the evidence against them consumes a few moments; and,

[d] the devastation of incongruent, illogical or inept argument by co-counsel.

These and numerous other factors serve to strain our traditional concepts of fairness.

In such a setting, the denial of a jury charge on a defendant's only real defense, is just too much.

Prosecutors have been spoiled and pampered too long by the appellate court's

invocation of "harmless error' and Rule 36 affirmances. Justice is now being threatened.

It is respectfully requested that this Court will announce that the basic rights of a criminal defendant are alive and well by granting this Petition for a Writ of Certiorari, reviewing the decision of the Court below, reversing its decision and remanding the case back to the United States Court of Appeals for the Eleventh Circuit with the direction that it order the judgment of the trial court reversed.

This 10TH day of July, 1992.

Charles R. Sheppard

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NO: 90-8804

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES ARTHUR ADAMS,

-and-

JOHNNIE LEE HAMILTON,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

U. S. v. HAMILTON

UNITED STATES of America,

Plaintiff-Appellee.

v.

Johnnie Lee HAMILTON. Grady Louis White, Charleston Kelley, Jr., Cassius Kelley, Donnell Kelley, Steven Lamar Cook, Frederick Harden, Judson Sims, Jr., James Arthur Adams and Stanley Bostic, Defendants-Appellants.

No. 90-8804.

United States Court of Appeals.

Eleventh Circuit.

Feb. 19, 1992.

Defendants were convicted for violation of federal narcotics laws and other drug-related offenses before the United States District Court for the Southern District of

Georgia, No. CR189-31-24, B. Avant Edenfield, Chief Judge, and they appealed. The Court of Appeals held that use of more than one gun during single drug trafficking offense would not support multiple counts of violating statute which enhances penalties for defendant who uses firearm during commission of crime.

Affirmed in part, vacated and remanded in part.

1. Criminal Law 1208.6(2)

Statute providing enhanced penalty for use of a firearm during crime of violence applies to multiple offenses, even if offenses are charged in single indictment. 18 U.S.C.A. Sec. 924(c).

* **See** Rule 34-2, Rules of the U. S. Court of Appeals for the Eleventh Circuit

2. Criminal Law 29(15), 1208.6(2)

Defendant who continually arms himself during course of on-going conspiracy cannot be convicted and sentenced for successive violations of statute enhancing penalties for use of firearm during crime of violence where there was single predicate offense. 18 U. S. C. A. Sec. 924(c).

3. Criminal Law 29(15), 1208.6(2)

Multiple convictions for violations of statute enhancing penalties for defendant who uses firearm during commission of crime of violence would have been proper for a defendant who continually armed himself during course of on-going conspiracy if Government had linked each firearm count to defendant's separate counts for possession of drugs. 18 U.S.C.A. Sec. 924(c).

Appeal from the United States District Court for the Southern District of Georgia.

Before **JOHNSON***, **CLARK*** and **PECK****, Senior Circuit Judges.

PER CURIAM.

This appeal arises from Appellants' convictions for violations of federal narcotics laws and other drug-related offenses. With the exception of Cassius Kelley's challenge to his sentence for violation of 18 U.S.C. Sec. 924(c), we find Appellants' arguments to be without merit and affirm the convictions.

FACTS

In 1989, an investigation of the "Kelley Organization" by authorities in Georgia and Florida culminated in the indictment of

** Honorable John W. Peck, Senior U. S. Circuit Judge for the Sixth Circuit, sitting by designation.

thirty-two individuals, including the ten Appellants, for violations of federal narcotics law. All of the Appellants were charged with conspiracy to possess with intent to distribute and to distribute cocaine powder, crack cocaine, marijuana, and heroin. Individual Appellants were charged with violations of federal firearms law and various other drug-related offenses. The indictment alleged that the drug conspiracy had existed for more than a decade and involved distribution of illegal drugs in Georgia, South Carolina, North Carolina, Tennessee, and Florida. After a jury trial, all Appellants were convicted of the conspiracy charge. Some Appellants were convicted on additional counts.

Appellants took a "shotgun" approach to their appeals. Issues on appeal included

a **Batson**[1] challenge, sufficiency of the evidence, double jeopardy, prosecutorial misconduct, and challenges of various evidentiary and procedural rulings. With the exception of Cassius Kelley's challenge to his sentence under 18 U.S.C. Sec. 924(c), we conclude that Appellants' contentions are without merit and affirm their convictions and sentences. See 11th Cir.R. 36-1.

ANALYSIS

With regard to Cassius Kelley's violations of 18 U.S.C. Sec. 924(c), the indictment alleged that Kelley "did use and carry certain firearms, during and in relation to [his] commission of a drug trafficking crime, that is, conspiracy to distribute and possess with intent to distribute" cocaine. The indictment alleged three separate violations by Kelley. The first count

[1] **Batson v. Kentucky, 476 U.S. 79, 106 S.Ct.**

involved Kelley's purchase of a Street Sweeper shotgun on October 8, 1988. Kelley's eighteenth birthday. He allegedly was seen firing it behind a carwash owned by a relative. The second count involved the search of Kelley's residence on December 2, 1988 during which several firearms were seized. The final count involved a subsequent search of another of Kelley's residences on July 21, 1989 when a machine pistol was seized from his bedroom. The predicate offense for each of these counts was the drug conspiracy.

Section 924(c) requires a mandatory five-year prison sentence for the first offense which cannot run concurrently with the sentence imposed for the underlying offense. At the time of Kelley's violations, Sec. 924(c) provided for a mandatory ten-year prison term for a "second or subsequent

conviction." The trial court imposed a twenty-five year cumulative sentence for the three firearms convictions. Kelley argues that this was error because there was only one predicate offense, conspiracy. Thus, the issue is whether a defendant who continually arms himself during the course of an on-going conspiracy can be convicted and sentenced to successive violations of Sec. 924(c).

[1-3] While this circuit has not addressed this issue directly, it has held that the enhanced penalty provision applies to multiple offenses, even if the offenses are charged in a single indictment. United States v. Rawlings, 821 F.2d 1543 (11th Cir.) cert denied, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2nd (1987); United States v. Hamblin, 911 F.2d 551, 554 (11th Cir. 1990), cert denied, ____U.S. _____, 111 S.Ct. 2241, 114 L.Ed.2d 482 (1991). In this case, the

Government has charged a single offense, albeit a continuing offense, as the predicate for the Sec. 924(c) counts. Use of more than one gun during a single drug trafficking offense will not support multiple counts under Sec. 924(c). See, e.g. United States v. Privette, 947 F.2d 1259 (5th Cir. 1991) (multiple sentences under Sec. 924(c) must be based on the number of drug trafficking offenses in which the guns were used, not the number of guns used in a single offense); United States v. Henning, 906 F2d, 1399 (10th Cir. 1990), cert. denied. ____U.S._____, 111 S.Ct. 789, 112 L.Ed.2d 852 (1991). ("[W]here a defendant has been convicted of a single drug trafficking offense and more than one firearm was involved, a single violation of Sec. 924(c) occurs and multiple consecutive sentences may not be stacked to account for each firearm seized."); United States v.

Henry, 878 F.2d 937, 942-945 (6th Cir. 1989) (Multiple Sec. 924(c) convictions proper where there is more than one predicate offense, but not merely because more than one gun was used); United States v. Fontanilla, 848 F.2d 1257, 1258-59 (9th Cir. 1988) ("Because the murder and assault were properly charged as separate crimes, it was permissible to charge appellant with a separate firearm charge for each crime."). But see, United States v. Freisinger, 937 F.2d 383 (8th Cir. 1991) (Sec. 924(c) (authorizes prosecution for each weapon used in relation to a single drug trafficking offense, but the sentences must run concurrently). We note that multiple Sec. 924(c) convictions would have been proper if the Government had linked each gun count to Kelley's separate counts for possession of

1712, 90 L.Ed 69 (1986).

drugs. However because the Sec. 924(c) counts were linked to a single conspiracy conviction, we hold that multiple sentences were improperly imposed.

CONCLUSION

In conclusion, we affirm the convictions and sentences of all Appellants except Cassius Kelley. With regard to Kelley, the proper remedy for multiplication of punishment is to vacate the sentences on all counts and remand with instructions that the two counts elected by the Government be dismissed. Privette, supra, at 1263. Accordingly, we **AFFIRM** one of Kelley's Sec. 924(c) convictions, **VACATE** the sentences under Sec. 924(c), and **REMAND** for resentencing on the remaining count after the selected counts are dismissed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-8804

FILED
U.S. COURT OF APPEALS
MAR 31 1992
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNIE LEE HAMILTON, and
JAMES ARTHUR ADAMS,

Defendants-Appellants.

Appeal from the United States District Court
for the
Southern District of Georgia

ON PETITION(S) FOR REHEARING
(March 31, 1992)

BEFORE: JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants, Johnnie Lee Hamilton and James Arthur Adams, is denied.

ENTERED FOR THE COURT

Frank M. Johnson

United States Circuit Judge

*See Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit

**Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

BEST AVAIL

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-8804

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 15 1992
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GRADY LOUIS WHITE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC

Before: JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on

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rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Frank M. Johnson

UNITED STATES CIRCUIT JUDGE

ORD-42

(9/91)

*See Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable John W. Peck, Senior U. S. Circuit Judge for the Sixth Circuit, sitting by designation.